

SOUTHERN UTAH WILDERNESS ALLIANCE ET AL.

IBLA 89-402

Decided October 12, 1989

Appeal from a decision of the San Juan Resource Area Manager, Bureau of Land Management, approving recreational permit EA UT-069-88-58.

Vacated and remanded.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Dismissal

An appeal from a decision approving an application for a recreational permit for a motor vehicle trip through Arch Canyon, Utah, could not be dismissed as moot even though the challenged event had occurred, where issues raised by the appeal were capable of repetition, and where failure to decide the appeal would cause substantial issues to evade review.

2. Federal Land Policy and Management Act of 1976: Permits--Federal Land Policy and Management Act of 1976: Land Use Planning--Federal Land Policy and Management Act of 1976: Rules and Regulations

Issuance of a recreational permit allowing motor vehicle travel in Arch Canyon without first amending an existing Management Framework Plan which prohibited such usage was contrary to provisions of 43 CFR 1610.8. Unless the Management Framework Plan were first amended to allow such travel, the prohibited usage could not be permitted.

3. Federal Land Policy and Management Act of 1976: Permits--Federal Land Policy and Management Act of 1976: Land Use Planning--Rights-of-way: Revised Statutes Sec. 2477

Adjudication of an application for a recreational travel permit which found the proposed travel would take place on a public road right-of-way established pursuant to

the Act of July 26, 1866, must be vacated where the record does not support a finding there is such a road within the permitted area of travel.

APPEARANCES: Scott Groene, Esq., Salt Lake City, Utah, for Southern Utah Wilderness Alliance; Rudy Lukez and William Lockhart, Esq., Salt Lake City, Utah, for Sierra Club, Utah Chapter; David K. Grayson, Assistant Regional Solicitor, Office of Solicitor, Intermountain Regional Office, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Southern Utah Wilderness Alliance and the Utah Chapter of the Sierra Club have appealed a San Juan Resource Area, Bureau of Land Management (BLM), Record of Decision and Finding of No Significant Impact (ROD/FONSI) and approval of Jeep Jamboree, Inc.'s, Special Recreation Application and Permit for an off-road-vehicle trip (Jeep Jamboree) between March 31 and April 1, 1989, in southern Utah's Arch Canyon. The Jeep Jamboree approved by BLM permitted 100 jeeps to traverse 8 miles in Arch Canyon and make numerous crossings of Arch Creek. The Canyon terrain and several of the river crossings traversed are depicted in exhibits furnished by appellants and BLM photographs included in the record. In 1988, a similar off-road excursion was held at Hole-in-the-Rock-Trail in BLM's Moab, Utah, District.

Appellants and BLM have stipulated that expeditious handling of this appeal to insure a decision before March 1990 is required. Their motion for expedited consideration is granted and a motion by BLM to dismiss the appeal as moot is denied, for reasons explained below.

Because the Jeep Jamboree at Arch Canyon was held as scheduled between March 31 and April 1, 1989, BLM contends the appeal is moot and should be dismissed. Opposing the motion, appellants cite the Board's recent decision in Colorado Environmental Coalition, 108 IBLA 10 (1989), as controlling. Distinguishing Colorado Environmental Coalition, *supra*, BLM avers that while it is true that the appellants in both cases were unable to obtain a stay pending appeal, appellants herein have given no indication that they have been unsuccessful in appealing any other off-road vehicle events, or that they will be unsuccessful in attempting to appeal this same event if it is held again next spring (BLM's Answer at 2).

We find our decision in Colorado Environmental Coalition controlling here. The record reveals that the challenged event has occurred twice, albeit at different locations, near Blanding, Utah. In each instance BLM prepared an environmental assessment (EA), and made its ROD/FONSI within hours of the scheduled event. For the first event, on January 21, 1988, Jeepers Jamboree & Jeep Jamboree, Inc., submitted a Special Recreation Application and Permit, the ROD/FONSI was completed on April 7, 1988, and BLM issued a permit for a jamboree at Hole-In-the-Rock-Trail on April 7, 1988. The first Jeep Jamboree occurred on April 8, 1988.

BLM prepared the 1989 EA and ROD/FONSI between March 27 and 28, 1989, and a permit for the challenged action issued March 28, 1989. Appellants requested and received a copy of the EA on March 29. On March 30, 1989, appellants filed joint notice of appeal from the ROD/FONSI and requested a stay of the decision until the Board ruled on the appeal, to include an order prohibiting motor vehicle travel in the Canyon until the appeal was decided. Nonetheless, the Jeep Jamboree occurred as scheduled, beginning on March 31, 1989. The Board did not receive a copy of the record until May 5, 1989. Consequently, timely action on the stay request was not taken.

Consistent with representations made concerning the recurring nature of the event supra, appellants aver that they have consulted with Jeep Jamboree, Inc., which has indicated an intention to hold the jamboree again in 1990 (SOR at 3). BLM does not dispute this point (Answer at 2).

In Colorado Environmental Coalition, appellants filed a notice of appeal from a decision of the State Director, BLM, dated September 21, 1988, affirming a September 12, 1988, ROD/FONSI approving an application for permit to drill (APD) a well near the Hovenweep National Monument. Immediately after the State Director's decision issued, work authorized by the APD commenced, including blasting to construct the well pad and improvement of the access road. While this work was being performed, appellant filed its appeal to the Board and requested a stay of operations. BLM thereafter moved to dismiss the appeal as moot, contending that all action authorized by the APD had occurred. Because the probability that the issue presented in Colorado Environmental Coalition would arise again was high, shown by the fact that at the time of the State Director's decision the same lessee had drilled one well and had two pending APD's for two other wells in the area, the Board denied BLM's motion. The Board explained it

will dismiss an appeal as moot where, subsequent to the filing of the appeal, circumstances have deprived the Board of any ability to provide effective relief and no concrete purpose would be served by resolution of the issues presented. Jack J. Grynberg, 88 IBLA 330 (1985); Douglas McFarland, 65 IBLA 380 (1982); John J. Murtha, 19 IBLA 97 (1975). Relying on this standard, however, we have declined to dismiss an appeal on the basis of mootness where, as in the judicial context, it presents an issue "which is capable of repetition, yet evading review" (Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911)), especially in circumstances where the BLM decision is placed by Departmental regulation into full force and effect pending resolution of the appeal, and action is taken pursuant thereto before the Board can act on a request for stay or otherwise reach the merits of the case. Yuma Audubon Society, 91 IBLA 309, 312 (1986), and cases cited therein.

108 IBLA at 15.

[1] The likelihood that the event challenged in this case will recur is substantial. Moreover, past administration of the permit process by BLM indicates that effective review cannot take place should the EA, ROD/FONSI,

and permit issuance nearly coincide with commencement of the permitted event. Because of the manner in which similar events have been previously handled, this is a case where the issue presented is "capable of repetition, yet evading review." Colorado Environmental Coalition, supra at 10. To dismiss the instant appeal, which presents potentially recurring issues, would deprive appellants of objective administrative review. Colorado Environmental Coalition. Id.

We therefore reject BLM's contention that appellants must prove that they have been unsuccessful in appealing other off-road vehicle events. We can find no legal authority for this proposition and see no practical reason for such a requirement. No such burden was imposed on appellants by the Board in Colorado Environmental Coalition.

Appellants contend, among other matters, that BLM's approval of the 1989 Jamboree violated the 1973 South San Juan Management Framework Plan [MFP], a portion of which appears as Exhibit C to the SOR. The MFP, appellants aver, closed Arch Canyon to off-road vehicle use (MFP at 5a and 5b). The reason provided by the MFP for requiring closure, appellants state, was that the area is an isolated canyon and that "[b]y protecting these areas from disturbance, they will be kept [sic] in their present condition for the backpacker looking for that wilderness experience" (MFP at 5a, quoted by SOR at 6). Appellants reason that the MFP controls recreational use in Arch Canyon because no final regional resource management plan (RMP) has been adopted for the San Juan Resource Area (SOR at 6, 7). It is appellants' position that when BLM permitted a non-conforming use of Arch Canyon it violated provisions of Departmental regulations implementing planning provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (1982). Appellants argue that:

BLM here failed to manage Arch Canyon in accordance with the 1973 MFP. The MFP closed Arch Canyon to ORV use, but BLM's ROD/FONSI allowed ORV use nonetheless. The BLM's EA stated that there is a 4-wheel drive "Class D road," apparently as justification for allowing ORV use. There is no road in Arch Canyon. * * * The claim of a "Class D. road" means nothing under federal law and in no way affects the mandates of the MFP. The EA admits that in fact there is no "road" in Arch Canyon, but rather that past 4-wheel drive use has created a path and that 4-wheel drive operators have done work so that they can drive their machines through the Canyon. This is exactly the type of activity that the BLM is supposed to protect Arch Canyon from under the MFP.

(SOR at 7). Further, appellants argue, they were entitled to prior notice of BLM's decision to permit the operation of motor vehicles in Arch Canyon because in 1988 appellants had made formal protest against such when a proposed RMP including the Arch Canyon was put forward by BLM. The protest, dated January 30, 1988, states pertinently:

Due to the contested legality of the Utah State Office's treatment of claimed RS 2477 rights-of-way, the proposed plan should suspend implementation of the August 1984 Memorandum of Understanding (MOU) with San Juan County until such time as the

legality and validity of BLM's RS 2477 policy in Utah is resolved in court. Further the MOU is invalid because BLM did not subject it to FLPMA planning analysis and NEPA [National Environmental Policy Act] analysis with public involvement. An example of the MOU's impact and its illegality is found in the proposed plan's management guidelines for Arch Canyon. BLM should close Arch Canyon to off road vehicle (ORV) use to protect cultural, riparian, scenic, and recreational values in accordance with FLPMA's mandate for protection of environmental quality [43 USC 1701(a)(8)]. BLM's recognition of a county Class D road in Arch Canyon is unsubstantiated by fact or law.

(Exh. B to SOR at 2).

BLM does not dispute that the 1973 MFP remains the operative plan for Arch Canyon (Answer at 4). Nonetheless, BLM contends that appellants' reliance on the plan is unfounded, because the MFP's conclusion that Arch Canyon should be closed to off-road vehicle use was "never implemented by the requisite order" (Answer at 4). Nonetheless, BLM concedes that to the extent the 1973 MFP was implemented, it is binding on BLM pursuant to 43 U.S.C. § 1732(a) (1982) (Answer at 4). BLM explains that an RMP is expected to be issued which, as presently drafted, recommends that Arch Canyon be "opened to existing roads and trails" (Answer at 4). Given appellants argument that there is no road in Arch Canyon, this response frames an issue concerning the existence of a public road right-of-way about which the record before us is otherwise silent. Before considering this issue, however, we must first consider the effect of current regulations on MFP's adopted prior to 1976.

[2] Pursuant to section 202 of FLPMA, 43 U.S.C. § 1712 (1982), the Secretary is required to develop, maintain, and revise land use plans for the public lands. 43 CFR Subpart 1601 implements section 1712, and provides for the development, adoption, and amendment of RMP's, replacing the planning mechanism existing prior to FLPMA. See generally 43 CFR Part 1600. Section 202 directs the Secretary to develop "land use plans" which establish the uses to which the public lands may be put. The distinction between prior planning and the planning required under FLPMA was discussed in National Wildlife Federation v. Burford, 676 F. Supp. 27 (D.C. 1985), where the court's opinion observed:

As section 202(a) evidences, Congress sought a comprehensive system of land use plans. In its regulations, the Interior Department identifies these land use plans as "Resource Management Plans" (RMP's). 43 C.F.R. § 1601.0-5(k) (1984). It is true that Congress did not reject altogether existing MFP's. It recognized that RMP's would not be ready immediately, see 43 U.S.C. § 1732(a) (referring to land use plans "when they are available"), and it noted that BLM's pre-FLPMA system of land planning was consistent in general principles and practices with the objectives of the Act. H. Rep. No. 1163, 94th Cong., 2d Sess. 5 (1976), reprinted in 1976 U.S. Code Cong. & Ad. News 6175, 6179.

Id. at 277, 278.

Under Departmental regulations the 1973 MFP was, at the time of the 1989 application by Jeep Jamboree, Inc., still an approved BLM plan for the public lands which remained effective until an RMP should be approved to supercede it. Nonetheless, BLM contends the MFP is not controlling in the case of the Jeep application because it was not implemented by a "requisite" order. This assertion is not supported by reference to any regulation requiring such order. On the record before us, it is not clear to what provision of law counsel for BLM has reference, unless it would be to the ROD/FONSI issued prior to the 1989 jamboree in Arch Canyon.

Nonetheless, BLM prepared an EA, as it was required to do by 43 CFR 1610.8(a)(3) as if an amendment of the 1973 MFP relating to motor vehicle use in Arch Canyon were planned. The EA prepared does not, however, refer to the 1973 MFP, nor does it purport to amend the plan. The relevant regulation provides, pertinent to this situation:

Until superseded by resource management plans, management framework plans may be the basis for * * * proposed actions * * * by the District or Area Manager [who shall determine] whether the proposed action is in conformance with the management framework plan. Such determination shall be in writing and shall explain the reasons for the determination.

43 CFR 1610.8(a)(3). The regulation quoted then goes on to provide that, if a proposed action is found to conform to the MFP, procedural regulations implementing NEPA, 42 U.S.C. § 4332 (1982), will apply. 43 CFR 1610.8(a)(3). If, however, an action should be nonconforming, then BLM is required to apply the provisions of 43 CFR 1610.5-5C (relating to amendment of RMP's) to the nonconforming MFP. 43 CFR 1610.8(a)(3)(ii). Departmental regulation 43 CFR 1610.5-5 requires BLM to evaluate the effect of an amendment on a plan, and amendment is required to be effected through either an EA or environmental impact statement (EIS). Id.

Since the 1989 Jeep Jamboree was a non-conforming use, such an explanation and amendment of the 1973 MFP were required to be made part of the EA. Because this aspect of the trip into the Canyon was not explored by BLM, the EA was inadequate under Departmental regulations to effect an amendment of the 1973 MFP to permit motor vehicle use in Arch Canyon. Consequently, the decision to issue a recreational permit allowing the Jeep Jamboree was contrary to the existing MFP and the planning regulations controlling the issuance of the permit and must be vacated.

[3] Appellants complain that the 1989 EA reveals an underlying assumption that there is a road in the Canyon, a condition which appellants deny exists. That the EA is premised on the proposition that there is a public road right-of-way in the Canyon, appellants argue, is confirmed when the EA describes the road believed to be found in the Canyon as "4-Wheel Drive" and "maintained mostly by vehicle passage and work done by recreationists to fix up bad spots to allow 4-wheel drive passage" (EA at 1).

That there is some question about the character of the road is suggested by the comment in the EA that

[t]he potential exists for this action [Jeep Jamboree] to either fix up portions of the road, thus losing its primitive condition, or to cause deterioration of the road so vehicle travel would not be possible. To mitigate this potential adverse impact we would require the permittee to leave the road in a 4-wheel drive pass-able condition and limit road improvements to hand moving of rocks and logs and hand shoveling of dirt.

Id. Describing the proposed action, the EA explains that travel through Arch Canyon will be on "San Juan County Class D Road." Id. The EA is ambiguous on the point, vacillating between a determination that the Canyon is in a natural state and a finding that a public right-of-way can be found there.

On the whole, however, examination of the EA indicates that BLM assumed a road existed in Arch Canyon for purposes of determining whether to prepare an EIS. Although not explicitly stated, the conclusion that an EIS was not required, and that therefore a FONSI could properly be made, rests on the conclusion that BLM considered there to be a public road right-of-way in Arch Canyon. The existence of this road is at the center of the controversy between appellants and BLM; appellants assume that there is no road in the Canyon, which has, they argue, characteristics of wilderness. They deny that BLM has any legal or factual reason for assuming the existence of a road in the Canyon, arguing that

the primary route for the alleged "road" travels through a ripar-ian area, including the Arch Canyon stream. The duty which the BLM has to riparian areas mandates that the agency challenge any property right claims by a non-federal party which conflict with riparian area protection. Authorization of ORV use up Arch Canyon, based on a claimed [road right-of-way], is allowing ORV traffic to crush riparian vegetation, damage banks and soils, and churn up the stream bottom. Even if a [road right-of-way] was ultimately proved, BLM retains a duty to prevent this undue and unnecessary degradation of a sensitive riparian area.

(Reply at 21).

BLM deals with this argument by stating that the question whether there was a road in the Canyon need not be answered by the Department because

it is not the function of the Department of the Interior to determine the legal status of roads claimed under R.S. 2477 by state and local governments, but * * * the Department may enter into agreements with state and local governments concerning management of such roads.

(Answer at 6). While it may be true that the existence of a right-of-way for a road across public lands under the Act of July 26, 1866, 43 U.S.C. § 932 (1976) (R.S. 2477), is usually considered a question of state law to be left to the state courts, this statement begs the question. That is, BLM assumes an R.S. 2477 road exists for purposes of environmental assessment of Arch Canyon to determine whether the Jeep Jamboree is an appropriate activity in that place, but will not question the foundation for the conclusion reached about the road, because adjudication of such roads is said to be left to state courts applying state law.

Before it was repealed by FLPMA section 706(a), effective October 21, 1976, R.S. 2477 provided: "The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted." A brief outline of Departmental decisions concerning the application of R.S. 2477 to BLM decision making appears in Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578 (1985). Therein, after observing that Departmental practice has been to avoid making determinations concerning R.S. 2477 roads when issuing land patents, two exceptions to this hands-off approach were outlined. The exception relevant here arises when BLM has an "administrative concern" which requires inquiry into the status of a claimed R.S. 2477 right-of-way:

An exception to this rule [that the Department would not adjudicate R.S. 2477 claims] was developed by the decisions in Nick DiRe, 55 IBLA 151 (1981) and Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976). The purpose of this exception, as explained in DiRe and Meeds, was to permit BLM to make determinations respecting R.S. 2477 rights-of-way in cases where a determination would be helpful in the administration of the public lands. In Meeds, the Board concluded BLM adjudication of the possible existence of such a right-of-way was necessary where a road closure proposed by BLM was protested because the road was claimed to be a public road established under R.S. 2477. The Board agreed this case was a special circumstance of "administrative concern" which could justify the effort and difficulty necessarily involved in making a determination normally reserved to the state courts because "it is appropriate that the Bureau review the propriety of its actions for its own purpose * * *." Id. at 26 IBLA 298-99, 83 I.D. at 323. [Emphasis supplied.] The Board was careful, however, to point out that this exception was to be limited in application, and would not extend to cases involving private claims. This exception for purposes of administrative necessity was again applied in Nick DiRe to the situation where an application was made for a private road right-of-way across an existing trail said to be an R.S. 2477 road. Relying upon the "administrative concern" exception created by Meeds, the DiRe Board concluded adjudication of the R.S. 2477 issue in that case was proper, stating:

Therefore, while the question of the existence of a "public highway" is ultimately a matter for state courts, BLM is not precluded from deciding the issue where it is considering an application for a private

road right-of-way, under section 501 of FLPMA, supra. The potential conflict is properly a matter of administrative concern.

89 IBLA at 338, 92 I.D. at 587.

This is such a case. BLM has been called upon, in the exercise of land planning and management duties, to determine whether to permit motor vehicle operations in Arch Canyon. Since 1988, a formal protest has been lodged by appellants against a proposal to permit such operations. This protest, which remains unresolved, states a complex legal objection against a finding that a public road right-of-way was ever located in the Canyon prior to repeal of R.S. 2477 in 1976. Whether this protest should have been considered by BLM when it adjudicated the Jeep Jamboree application for permit need not now be decided, because the same objection has been directly raised in this appeal, which involves the same area and the same issue concerning whether there is a road. Although directly confronted with this conflict when called upon to adjudicate the 1989 recreation permit, BLM determined that a finding on the issue was "not the function of the Department."

This position is mistaken, because the issue before us arises in a matter of "administrative concern" and requires resolution by BLM in the administration of Departmental regulations respecting planning and permit-ting. Several Federal court decisions have given approval to this position, finding that, while the courts may be the final arbiters whether a given R.S. 2477 right-of-way has legal existence, initial action defining and determining such a right-of-way is properly taken by BLM. Sierra Club v. Hodel, 675 F. Supp. 594 (D. Utah 1987), aff'd 848 F.2d 1068 (9th Cir. 1988). If, in administering the Arch Canyon lands pursuant to provisions of 43 CFR Subpart 1610, BLM finds it would be helpful to determine whether an R.S. 2477 road was established there, then it must develop a record to support whatever conclusions are drawn about the matter. See Nick DiRe, supra at 154-56.

Arguments raised by appellants concerning claimed violations of NEPA cannot be reached, because to do so would be premature, on the record before us. This case has, of necessity, been decided on procedural issues raised concerning BLM's administration of its planning regulations which require the preparation of an adequate record to support the finding under review. Arguments raised by appellants concerning the proper application of NEPA and NEPA regulations have also not been discussed in this opinion because they are not ripe for review, and no opinion concerning those questions can properly be issued until a record permitting such review is made. Further, substantive arguments concerning the disputed road right-of-way in the canyon are not addressed for want of a record of evidence showing whether there is a road. On the record before us there can be no decision concerning the substantive merits of these arguments and no opinion is expressed about them.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case file is remanded.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge